

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH STONE and DEBRA STONE,

Defendants.

Case No. CR04-251L

ORDER DENYING MOTIONS TO  
SUPPRESS EVIDENCE

This matter comes before the Court on the “Motion to Suppress Evidence, and Request for a Franks Hearing” (Dkt. # 100) filed by defendant Kenneth Stone and the “Motion to Suppress Evidence and for Evidentiary Hearing” (Dkt. # 102) filed by defendant Debra Stone.<sup>1</sup> For the reasons set forth below, the motions are denied.

**I. BACKGROUND**

On March 15, 2004, detective Roy Alloway of the Westsound Narcotics Enforcement Team (WestNET) applied for and received warrants to search four properties in Kitsap County, Washington. Det. Alloway provided the following information in support of the search warrant:

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<sup>1</sup>Co-defendants Ronnie Irish and Crystal Irish also joined in the motion. Ronnie and Crystal Irish, however, have both entered guilty pleas prior to the disposition of this motion. See Dkt. #s 132 & 133.

(1) past tips implicating Kenneth Stone and his brother, Mike Stone, in marijuana growing operations; (2) information from a cooperating informant, Jennifer Johnson, who provided details regarding Kenneth Stone's marijuana growing operations and information regarding Kenneth Stone's co-defendants; and (3) Det. Alloway's claim that when he approached one of the properties, located at 2595 S.W. Pine Road, he could smell the odor of growing marijuana.

On March 18, 2004, WestNET detectives and other officers executed the warrants. At each of the properties searched, detectives located evidence of marijuana growing and distribution. At the Pine Road property detectives found: 256 live marijuana plants located inside two white construction trailers; a large bag of dried marijuana plants with leaves removed; seven pairs of scissors with marijuana residue on them; a five gallon bucket containing a plastic bag that held about 49.5 grams of harvested marijuana; and extra pots, planting stakes, and other material that appeared to be used in the marijuana grow operation. Kenneth and Debra Stone, along with a number of other individuals, were subsequently arrested.

On March 18, 2005, Kenneth Stone filed the motion to suppress and request for a Franks hearing. In that motion, Mr. Stone argues that the search warrant is invalid as it relates to the Pine Road property because (1) the warrant failed to identify the two construction trailers at the Pines Road property that contained the seized marijuana plants; (2) Det. Alloway's claim that he could smell the odor of growing marijuana at the Pines Road property constituted a false and materially misleading statement. Kenneth Stone requested a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

Defendant Debra Stone also filed a motion to suppress evidence on March 18, 2005. In that motion, Ms. Stone argued that (1) the affidavits submitted in support of the request for the search warrant of the Pine Road property failed to establish probable cause, (2) the warrants were overbroad, and (3) Det. Alloway made a material misstatement in his affidavit. Ms. Stone also joined in the suppression motion filed by Mr. Stone.

1 This Court conducted an evidentiary hearing over the course of two days, beginning on  
2 June 1, 2005 and resuming on July 1, 2005. Patrick L. Walsh, Warren James Woodford, Ph.D.,  
3 Robert Breidenthal, and Vera Fuchs testified on behalf of the defendants. Detective Alloway,  
4 Detective Dale Schuster, and Dr. Samir Ross testified on behalf of the government.

## 5 II. DISCUSSION

### 6 1. Standard of Review.

7 The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons,  
8 houses, papers, and effects, against unreasonable searches and seizures” and requires that any  
9 warrant authorizing a search “particularly describ[e] the place to be searched, and the persons or  
10 things to be seized.” U.S. Const. amend. IV. In addition, the affidavits filed in support of a  
11 search warrant must provide sufficient probable cause to justify its issuance.

12 In determining whether probable cause exists, the reviewing officer must “make a  
13 practical, common-sense decision whether, given all of the circumstances set forth in the  
14 affidavit . . . including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay  
15 information, there is a fair probability that contraband or evidence of a crime will be found in a  
16 particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983) (quoting Jones v. U.S., 362 U.S.  
17 257, 271 (1960)); accord, U.S. v. Ventresca, 380 U.S. 102, 108 (1965) (affidavits in support of a  
18 search warrant are “tested and interpreted by magistrates and courts in a commonsense and  
19 realistic fashion”).

20 In a subsequent review of the affidavit and finding of probable cause, this Court accord’s  
21 deference to the issuing judge’s finding of probable cause, see U.S. v. Terry, 911 F.2d 272, 275  
22 (9<sup>th</sup> Cir. 1990), and must uphold the judge’s determination if there is a “substantial basis” for  
23 concluding that a search would uncover evidence of wrongdoing, Illinois v. Gates, 462 U.S. at  
24 236.

**2. Probable Cause to Search the Trailers.**

Defendants have claimed that the officers did not have probable cause to search the two trailers on the Pine Road property. They note that although the Alloway affidavit mentioned three different structures on the Pine Road property, it did not mention the two trailers. The search warrant signed by Kitsap County Superior Court Judge Mills, however, authorized the search of the three different structures as well as “other outbuildings” located on the property. Defendants argue that the warrant was overly broad because the Alloway affidavit did not provide a sufficient basis for the expansion of the warrant beyond the search of the three structures that were specifically mentioned.

The search warrant was not overly broad. Judge Mills had a substantial basis for determining that probable cause existed to search all of the buildings on the Pines Road property, not just the three structures specifically mentioned in the Alloway affidavit. As the Ninth Circuit has made clear, a search warrant “is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect.” U.S. v. Alexander, 761 F.2d 1294, 1301 (9<sup>th</sup> Cir. 1985). The Alloway affidavit specified the street address to be searched, indicated that the property was rented, that the electrical bills were in the name of Debra Stone (Debra Jackson’s maiden name) and included Ms. Jackson’s social security number. In addition, the affidavit provided probable cause to believe that the property contained a large-scale marijuana growing operation and that the entire property was suspect. As in Alexander, the evidence to be seized in this case “was of a type that could be hidden easily in any structure. The most reasonable place to look for contraband on rural, undeveloped acreage is in the structures on that acreage. A warrant authorizing the search of any building . . . was reasonable under the circumstances and not overly broad.” 761 F.2d at 1301.

In addition, the two trailers containing the marijuana plants were within the curtilage of

1 the main residence. “A search warrant for a residence may include all other buildings and other  
2 objects within the curtilage of that residence, even if not specifically referenced in the search  
3 warrant.” U.S. v. Cannon, 264 F.3d 875, 881 (9<sup>th</sup> Cir. 2001), cert. denied, 534 U.S. 1143  
4 (2002). To determine whether a building is within the curtilage of a residence, the Court  
5 considers four factors:

6 (1) the area’s proximity to the home, (2) whether the area is included within an  
7 enclosure surrounding the home, (3) whether the area is being used for the intimate  
8 activities of the home, and (4) the steps taken by the resident to protect the area  
9 from observation by passers-by.

10 Id. (citing U.S. v. Dunn, 480 U.S. 294, 301 (1987)). The two trailers meet all of the Dunn  
11 factors. The trailers were located in the fenced-in backyard of the main residence. A covered  
12 area made of wood and tarps connected the trailers to the main residence. Power lines ran from  
13 the main residence into the two trailers. Three Rottweilers patrolled the backyard and initially  
14 prohibited the officers from entering the backyard. Indeed, the trailers were not just curtilage of  
15 the residence, they were connected to and, for all practical purposes, a part of the residence.  
16 Under the circumstances, there is no doubt that the search warrant, even without the “other  
17 buildings” language, authorized the search of the trailers.

### 18 **3. Defendants’ Franks Challenge.**

19 Defendants argue that Det. Alloway intentionally or recklessly made a material false or  
20 misleading statement in his affidavit when he asserted that he could smell the odor of growing  
21 marijuana when standing outside the Pines Road property. In response to their allegation, this  
22 Court held a hearing in accordance with Franks v. Delaware. A Franks hearing involves two  
23 steps. First, defendants must show by a preponderance of the evidence that the affiant officer  
24 intentionally or recklessly made false or misleading statements or omissions in support of the  
25 warrant. If defendants meet their burden and the Court “finds by a preponderance of the  
26 evidence that the officer so acted, the district court then inquires into whether ‘with the  
27 affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to  
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1 establish probable cause.’’ U.S. v. Martinez-Garcia, 397 F.3d 1205, 1215 (9<sup>th</sup> Cir. 2005)  
2 (quoting Franks, 438 U.S. at 156).

3 Based on the testimony and evidence at the Franks hearing, this Court finds that Det.  
4 Alloway did not materially or recklessly make a false or misleading statement in his affidavit.  
5 Defendants argued forcefully that the marijuana plants in the two trailers were in a vegetative  
6 state and that it would have been physically impossible for Det. Alloway to have smelled the  
7 distinctive odor of marijuana from these plants. In addition, they asserted that the topography  
8 and wind patterns in the Pine Road area made it unlikely that Det. Alloway could smell  
9 marijuana from the edge of the property.

10 The government, however, provided the testimony of Dr. Samir Ross, who convincingly  
11 testified that marijuana plants in a vegetative state do produce the smell associated with  
12 marijuana, albeit in a less concentrated form. The government also sufficiently called into  
13 question defendants’ arguments based on topography and wind patterns. Defendants’ expert  
14 acknowledge that wind patterns are unpredictable and that the direction of the wind at the time  
15 Det. Alloway smelled the marijuana simply could not be determined.

16 In addition, the government introduced evidence that showed that mature marijuana  
17 plants had recently been harvested at the property. For instance, detectives found a large bag of  
18 dried marijuana plants with leaf material removed, scissors that had been stained with marijuana  
19 residue, and a plastic bag containing 49.5 grams of harvested marijuana. The government  
20 convincingly argued that the smell of marijuana may have come from these items, as well. This  
21 contention was supported by Dr. Ross and also by the supplemental report of Det. Schuster, who  
22 indicated that the main residence at Pine Road contained a strong smell of marijuana.

23 Most importantly, however, the government provided the testimony of Det. Alloway, who  
24 described his investigation of defendants. He detailed his extensive experience in drug  
25 enforcement, and provided a description of his surveillance of the Pine Road property. This  
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1 Court found Det. Alloway's testimony sincere and credible. Accordingly, defendants have not  
2 met their burden of showing by a preponderance of the evidence that Det. Alloway intentionally  
3 or recklessly made a false or misleading statement in support of the warrant.

4 For purposes of the Franks hearing, the inquiry ends here. Nevertheless, it is worth  
5 noting that even if defendants were able to show that a false or misleading statements had been  
6 made, they would not have been able to satisfy the second part of the Franks inquiry. Det.  
7 Alloway had presented a thorough and detailed complaint for warrant. The testimony regarding  
8 the odor of marijuana at the Pines Road property was only a small part of that complaint. If the  
9 Court were to set the portion of his complaint regarding the smell of marijuana aside, the 27  
10 page affidavit would still provide sufficient probable cause to justify Judge Mills's decision to  
11 issue the warrant.

### 12 III. CONCLUSION

13 For all the foregoing reasons, the "Motion to Suppress Evidence, and Request for a  
14 Franks Hearing" (Dkt. # 100) filed by defendant Kenneth Stone and the "Motion to Suppress  
15 Evidence and for Evidentiary Hearing" (Dkt. # 102) filed by defendant Debra Stone are  
16 DENIED.

17  
18 DATED this 11<sup>th</sup> day of July, 2005.

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21 Robert S. Lasnik  
22 United States District Judge  
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